

¹ 5 U.S.C. § 8101 *et seq.*

exposure to noise at work. He noted working for over 25 years and being exposed to noise from quarterly qualifications and training with firearms, which created hearing loss and tinnitus in his left ear. Appellant noted that he first became aware of his hearing loss on July 28, 2015, and also realized that it was causally related to factors of his federal employment on the same date. He retired on December 31, 2013.

By development letter dated December 18, 2015, OWCP advised appellant of the type of evidence needed to establish his claim. In a letter of the same date, it requested that the employing establishment address the sources of appellant's noise exposure, including decibel and frequency level, period of exposure, and hearing protection provided.

Appellant submitted a January 14, 2016 report from Dr. Jorge Contreras, a Board-certified otolaryngologist, who treated him for tinnitus and hearing loss. He reported a gradual onset of symptoms beginning nine months prior, which followed a 25-year career as a border patrol agent where he was exposed to noise from weapons. Dr. Contreras noted findings on examination of normal external auditory canals and tympanic membranes, grossly normal pinnae, nontender mastoid bones, grossly normal external nose, clear nasal mucosa, no masses, and benign turbinates. He diagnosed hypertension, tinnitus, and bilateral sensorineural high frequency hearing loss. Dr. Contreras noted that the audiogram revealed down sloping high frequency sensorineural hearing loss in the moderate-to-moderate severe range. Appellant reported working as a border patrol agent and was exposed to loud noise from firearms. Dr. Contreras opined that it was at least 50 percent likely that appellant's symptoms were due to his work exposure and recommended hearing protection and yearly audiograms.

By decision dated January 20, 2016, OWCP denied appellant's claim for compensation, finding that the evidence of record was insufficient to establish that the events occurred as alleged. It indicated that appellant failed to submit a detailed employment history which included information about his exposure to loud noise.

The employing establishment submitted a January 7, 2016 statement from J.S., chief patrol agent, who noted that appellant was exposed to various firearms shooting ranges. J.S. noted that the source of the exposure was multiple gunshots from various caliber weapons. He indicated that firearm qualifications were conducted in one day on a quarterly basis throughout the year and varied from four-to-six hours of exposure. J.S. noted that appellant was provided hearing protection from disposable foam earplugs and earmuffs.

On January 28, 2016 appellant requested a review of the written record by a representative of OWCP's Branch of Hearings and Review. In a separate statement dated January 28, 2016, he noted that as a border patrol agent he was required to qualify with several firearms on a quarterly basis. Appellant indicated that the firearms ranged from handguns, shotguns to fully automatic weapons. He noted that in the 25 years he worked in the border patrol, he was exposed to at least 15,000 shots fired from weapons.

In an undated employee statement, appellant reported that he first became a border patrol agent on September 25, 1988. He indicated that the basic requirement of the position was to train and work around firearms at least once every three months, which entailed qualifications with specific firearms and training with others. Appellant noted that each quarterly training session

involved eight hours of training and the firing of hundreds of rounds of ammunition. He further noted events where firearms were used in the field and he did not wear hearing protection. Appellant indicated experiencing bilateral hearing loss and tinnitus. He noted that tinnitus caused constant ringing in his ears which did not diminish and affected his concentration, focus, and sleep. Appellant submitted an audiogram dated July 28, 2015 in which the author's signature was illegible. He submitted a Notification of Personnel Action (SF-50), which indicated that he voluntarily retired on December 31, 2013.

By decision dated May 16, 2016, an OWCP hearing representative set aside the decision dated January 20, 2016 and remanded the case for further medical development. He noted receiving additional evidence indicating that appellant was exposed to work-related noise while employed as a border patrol agent for 25 years.

A statement of accepted facts (SOAF) dated June 2, 2016 noted that appellant was employed as a border patrol agent from September 1988 to December 2013. Appellant attended quarterly firearms training, which lasted eight hours and entailed qualifying and training with different types of firearms. He was provided ear protection in the form of earplugs and earmuffs. Appellant was also exposed to firearms in the field where hearing protection was not worn. He did not have hobbies which involved exposure to loud noises. Appellant retired on December 31, 2013.

On December 7, 2016 OWCP referred appellant, together with the SOAF, to Dr. Edward M. Goldman, a Board-certified otolaryngologist, for an otologic examination and an audiological evaluation. In a January 26, 2017 report, Dr. Goldman noted examining appellant on January 26, 2017 and referenced appellant's exposure to workplace noise. Examination of the ears revealed normal canals and drums, normal drum motility, normal tuning forks test, and no asymmetry. Dr. Goldman diagnosed bilateral sensorineural hearing loss with bilateral tinnitus. He noted that the sensorineural hearing loss was in part if not all due to the noise encounter in appellant's federal civilian employment. Dr. Goldman noted that appellant had excessive work history of noise exposure to firearms and traffic checks. He noted that the workplace exposure as described was sufficient in intensity and duration to have caused the loss in question. Dr. Goldman opined that appellant had monaural impairment of zero percent in the left ear, zero percent in the right ear, and five percent binaural impairment for tinnitus. He indicated that hearing aids were not indicated. Audiometric testing was performed for Dr. Goldman on January 6, 2017. Testing at the frequency levels of 500, 1,000, 2,000, and 3,000 cycles per second revealed the following: right ear 20, 20, 10, and 25 decibels; left ear 20, 15, 20, and 30 decibels.

On September 21, 2017 an OWCP medical adviser reviewed Dr. Goldman's report dated January 26, 2017 and the audiometric test of January 6, 2017. He concluded that, in accordance with the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*,² (A.M.A., *Guides*), appellant had zero percent monaural hearing loss in each ear and zero percent binaural hearing loss. The medical adviser determined that appellant's hearing loss was not severe enough to be ratable for a schedule award after applying OWCP's standards for evaluating hearing loss to the results of the January 6, 2017 audiogram. He noted

² A.M.A., *Guides* (6th ed. 2009).

that appellant reached maximum medical improvement on January 6, 2017. The medical adviser indicated that Dr. Goldman assigned five percent impairment for tinnitus. He, however, found no documentation to support that the tinnitus interfered with daily activities, so he did not assign impairment for tinnitus.

On September 25, 2017 OWCP accepted appellant's claim for bilateral sensorineural hearing loss due to noise exposure.

By decision dated October 4, 2017, OWCP found that, although appellant's hearing loss was employment related, it was not severe enough to be considered ratable for purposes of a schedule award.

LEGAL PRECEDENT

The schedule award provisions of FECA³ and its implementing regulations⁴ set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss or loss of use, of scheduled members or functions of the body. However, FECA does not specify the manner in which the percentage of loss shall be determined. For consistent results and to ensure equal justice under the law to all claimants, good administrative practice necessitates the use of a single set of tables so that there may be uniform standards applicable to all claimants. The A.M.A., *Guides* has been adopted by FECA's implementing regulations as the appropriate standard for evaluating schedule losses.⁵

OWCP evaluates industrial hearing loss in accordance with the standards contained in the A.M.A., *Guides*.⁶ Using the frequencies of 500, 1,000, 2,000, and 3,000 cycles per second, the losses at each frequency are added up and averaged.⁷ Then, the "fence" of 25 decibels is deducted because, as the A.M.A., *Guides* notes, losses below 25 decibels result in no impairment in the ability to hear everyday speech under everyday conditions.⁸ The remaining amount is multiplied by a factor of 1.5 to arrive at the percentage of monaural hearing loss.⁹ The binaural loss is determined by calculating the loss in each ear using the formula for monaural loss. The lesser loss is multiplied by five, then added to the greater loss and the total is divided by six to arrive at the

³ 5 U.S.C. § 8107.

⁴ 20 C.F.R. § 10.404 (1999).

⁵ *Id.* See also *Jacqueline S. Harris*, 54 ECAB 139 (2002).

⁶ A.M.A., *Guides* 250 (6th ed. 2009).

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

amount of the binaural hearing loss.¹⁰ The Board has concurred in OWCP's adoption of this standard for evaluating hearing loss.¹¹

Regarding tinnitus, the A.M.A., *Guides* provides that tinnitus is not a disease, but rather a symptom that may be the result of disease or injury.¹² The A.M.A., *Guides* also provides that if tinnitus interferes with activities of daily living, including sleep, reading (and other tasks requiring concentration), enjoyment of quiet recreation, and emotional well-being, up to five percent may be added to a measurable binaural hearing impairment.¹³

OWCP procedures provide that, after obtaining all necessary medical evidence, the file should be routed to OWCP's medical adviser for an opinion concerning the nature and percentage of impairment in accordance with the A.M.A., *Guides*, with the medical adviser providing rationale for the percentage of impairment specified.¹⁴ OWCP may follow the advice of its medical adviser or consultant where he or she has properly utilized the A.M.A., *Guides*.¹⁵

ANALYSIS

OWCP accepted that appellant sustained binaural hearing loss due to noise exposure from his federal employment. The issue is whether appellant has proven a schedule award by establishing that he sustained a ratable impairment in accordance with the A.M.A., *Guides*. The Board finds that the evidence of record does not establish that appellant has a ratable impairment based on his accepted binaural hearing loss. The January 6, 2017 audiogram results did not demonstrate ratable values in accordance with the sixth edition of the A.M.A., *Guides*.

OWCP properly referred appellant to Dr. Goldman for an examination relative to his hearing loss. Dr. Goldman's January 26, 2017 examination found that appellant's binaural sensorineural hearing loss was due to his workplace noise exposure. On September 21, 2017 an OWCP medical adviser reviewed Dr. Goldman's report and found that the hearing loss was not ratable for schedule award purposes. He applied the standardized procedures to the January 6, 2017 audiogram performed for Dr. Goldman to determine whether appellant's hearing loss was ratable for schedule award purposes.

¹⁰ *Id.*

¹¹ *Donald E. Stockstad*, 53 ECAB 301 (2002), *petition for recon. granted (modifying prior decision)*, Docket No. 01-1570 (issued August 13, 2002).

¹² A.M.A., *Guides* 249 (6th ed. 2009).

¹³ *Id.* See also *R.O.*, Docket No. 13-1036 (issued August 28, 2013); *R.H.*, Docket No. 10-2139 (issued July 13, 2011); *Robert E. Cullison*, 55 ECAB 570, 573 (2004).

¹⁴ See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6(f) (March 2017).

¹⁵ See *Ronald J. Pavlik*, 33 ECAB 1596 (1982).

Testing for the right ear at the frequency levels of 500, 1,000, 2,000, and 3,000 cycles per second revealed decibels losses of 20, 20, 10, and 25, respectively. These decibels were totaled at 75 and were divided by 4 to obtain an average hearing loss at those cycles of 18.75 decibels. The average of 18.75 decibels was then reduced by 25 decibels (the first 25 decibels were discounted as discussed above) to equal zero percent hearing loss for the right ear.

Testing for the left ear at the frequency levels of 500, 1,000, 2,000, and 3,000 cycles per second revealed decibels losses of 20, 15, 20, and 30 respectively. These decibels were totaled at 85 and were divided by 4 to obtain the average hearing loss at those cycles of 21.25 decibels. The average of 21.25 decibels was then reduced by 25 decibels (the first 25 decibels were discounted as discussed above) to 0 which was multiplied by the established factor of 1.5 to compute a zero percent hearing loss for the left ear. Thus, OWCP's medical adviser concluded that appellant did not have ratable permanent impairment of his hearing, warranting a schedule award. Consequently, the Board finds that appellant does not have a ratable hearing loss under OWCP's standardized procedures thereby warranting a schedule award.¹⁶

The Board notes that Dr. Goldman diagnosed tinnitus. The A.M.A., *Guides* allows for compensation of up to five percent for tinnitus in the presence of measurable hearing loss if the tinnitus impacts the ability to perform activities of daily living.¹⁷ The Board has held that, in the absence of a ratable hearing loss, a schedule award for tinnitus is not appropriate.¹⁸ As explained above, appellant has not established a ratable hearing loss. He is therefore not entitled to a schedule award.

On appeal appellant asserts that he sustained sensorineural hearing loss and tinnitus and should have been granted a schedule award. For the reasons set forth above, appellant has not established his claim for a schedule award.

Appellant may request a schedule award or increased schedule award at any time based on evidence of a new exposure or medical evidence showing progression of an employment-related condition resulting in permanent impairment or increased impairment.

CONCLUSION

The Board finds that appellant has not established ratable hearing loss, warranting a schedule award.

¹⁶ See *W.T.*, Docket No. 17-1723 (issued March 20, 2018).

¹⁷ A.M.A., *Guides*, *supra* note 6 at 246; see *Leslie M. Mahin*, 55 ECAB 311 (2004).

¹⁸ *L.S.*, 57 ECAB 725 (2006).

ORDER

IT IS HEREBY ORDERED THAT the October 4, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 29, 2018
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board